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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 992

DANIEL L. GINSBERG, individually and on behalf of five sixths of the stockholders of Nash Miami Motors, Inc.
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that this Court grant rehearing of its order of March 13, 1967, denying the petition for writ of certiorari, ——U.S.——, 35 LW 3322, and that a writ of certiorari issue to review the judgment of the Supreme Court of Florida in the above-entitled case as prayed for in the petition filed January 21, 1967, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Substantial grounds in support of the issuance of the writ are available to Petitioner and here presented, which were not presented in the petition.

Respondent has conceded in its Memorandum previously filed herein that, under 26 U.S.C. 6871, "the district director . . . has the *option either* to continue litigating before the Tax Court *or* to litigate the claim in the state court." (emphasis supplied) (Res. 4). What respondent has not admitted but what is clear upon the record is that it has done both.

The Government would have the Court believe that they hardly did more than make a clerical application to be heard in the State Court below when they say: "The mere filing of the tax claim in the State Court did not constitute an election to litigate the claim there; such filing was merely a protective step . . . ", (Res. 4). But, in truth, the Government initiated substantial action to its benefit, in the state courts below.

As illustrated by the reported case of *In re dissolution of Nash Miami Motors, Inc., United States v. Nash Miami Motors, Inc.*, 169 So.2d 491 (3rd D.C.A. Fla. 1964), the Government not only actively litigated its claim in the Florida State trial court prior to the rendition of the Tax Court decision (November 25, 1964), but also took an interlocutory appeal from an adverse ruling of the trial court made in February, 1964, and was successful thereby in having reversed the priority of the claim of the First National Bank of Miami in the sum of $9,655.25.

In addition, on remand to the Circuit Court, the Government was successful in defending against a claim for attorney's fees.

Thus while the Government has claimed that it was litigating only in the Tax Court, it was in fact simultaneously prosecuting its claim in the state courts below.

The jurisdictional conflict between the state courts and the Tax Court, which petitioner adverted to in the petition, was therefore clearly present in this case, rather than merely potential as may have appeared from the petition and the Government's memorandum in reply.

In both the Second and Fifth Circuits, which are the only two Courts of Appeal which have considered this jurisdictional conflict, the conclusions as to the effect of presentation and litigation of the tax claim in the receivership Court are the same. The Second Circuit said:

> "We view the provisions of section 6871 not as a mere brief suspension of the requirements of section 6213, but rather as a completely superseding procedure for the determination and collection of tax claims that are asserted in bankruptcy." *Cohen v. Gross*, 316 F.2d 521, 522.

The Fifth Circuit in recognizing *Cohen v. Gross, supra.* and after an examination of the legislative history, said:

> "The legislative history makes clear the intent of Congress that Section 6871 was meant to 'take the case from the jurisdiction of the United States Board of Tax Appeals (now the Tax Court

of the United States) in cases of deficiency.' H. Rep. No. 704, 73rd Cong., 2d Sess. p. 34 (1939) 1939-1 Cum. Bull. 554, 580." 334 F.2d at 341.

The language of the statute, the legislative history, and the decisions of the courts are clear. The Government, having elected the State court forum by its claim and litigation therein, ousted the Tax Court of jurisdiction. The Tax Court decision relied upon by the State court below was therefore a nullity.

It is apparent from the record, that the present case represents not an aberration, but standard practice on the part of the Government in direct violation of the statutory language and intent. The question here presented is one of the utmost practical importance to all Tax Court litigants who go into bankruptcy or receivership proceedings while their cases remain pending in the Tax Court. It is a matter of fundamental importance upon which review, clarification and correction by this Court is appropriate and necessary.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Florida.

Respectfully submitted,

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Allan Milledge

Richard L. Horn

Eleanor L. Schockett
Counsel for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Counsel for Petitioners